IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
Misc. No.- 76-5761

Michael Lee Simpson,
Tommy Wayne Simpson — Petitioners

v.

United States [redacted] — Respondent

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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Fred E. Fugazzi, Jr.

Shelby G. Kinkead, Jr.
P. O. Box 1489
111 Church Street
Lexington, Kentucky 40501
1-606-252-2312 ext. 2701
Federal Public Defender's Office

I N D E X

T A B L E O F C A S E S

(Alphabetically)

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The petitioners, Michael Lee Simpson and Tommy Wayne Simpson, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 9, 1976, and October 14, 1976.

A.
Opinions Below

The opinion of the Court and the order denying the petition for rehearing appear in the Appendix hereto.

B.
Statement of Jurisdiction
Date of Judgment Reviewed
Date of Denial of Rehearing
Statutory Provision

The judgment of the Court of Appeals was rendered on October 14, 1976. A timely petition for rehearing was denied on November 9, 1976. This petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked pursuant

to 28 U.S.C. 1254(1).

C.
Question Presented For Review

1. Whether the trial court imposed an illegal sentence in committing the petitioners to prison under separate sentences for violations of both 18 U.S.C. 2113(d) and 18 U.S.C. 924 (c) when both offenses arose from the same set of facts.

D.
Statutory Provisions Involved

1. United States Code, Title 18:

§2113(d)

Whoever, by force or violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

. . . .

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000.00 or imprisoned not more than twenty-five years, or both.

2. United States Code, Title 18:

§924(c)

Whoever - uses a firearm to commit any felony for which he may be prosecuted in a court of the United States,

. . . .

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment of not less than one year nor more than ten years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provisions of law, the court shall not suspend the sentence in the case of the second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the conviction of such felony.

E.
Statement of the Case

The petitioners herein were convicted on February 2 and February 24, 1976 for two separate armed bank robberies. They were also convicted on each occassion of the offense of using a firearm to commit a felony. The Court sentenced each petitioner to twenty-five year terms for each bank robbery and to ten years for each firearm felony, all consecutive to each other. The proof at trial demonstrated that the petitioners flourished handguns during the commission of the bank robberies. The bank robberies were the felonies to which the firearm convictions pertained.

F.
Basis For Original Federal Jurisdiction

The petitioners were brought before the District Court to answer indictments alleging violations of Title 18 of the United States Code.

G.
Argument For Allowance Of Writ

1. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

The Sixth Circuit held that the two statutes related to separate offenses involving different elements and therefor were not duplicitous. The Court cited opinions in the cases of United States v. Crew, _____ F2d _____(4th Cir. No. 75-1581) and Perkins v. United States, 526 F2d 688 (5th Cir. 1976).

The Eighth Circuit held in the case of United States of America v. James Theodore Eagle, _____ F2d _____. (8th Cir. 75-1926) that a conviction under §924(c) of Title 18 could not stand where the felony referred to therein was a §1153 violation of Title 18 arising from the same facts.

Unlike the Sixth, Fourth, and Fifth Circuit, the Eighth Circuit held that Congress did not intend for the Gun Control Act to govern wherein the statute underlying the felony itself provided for increased punishment for the use of a dangerous weapon. The cases decided by the Sixth, Fourth and Fifth Circuits addressed aggravated bank robberies. These are felonies for which increased punishment is provided for the use of a dangerous weapon.

These cases present a disparity in the application of federal law affecting the substantive rights of federal offenders. The offenders are subject to undefined statutory or constitutional interpretation of these federal laws.

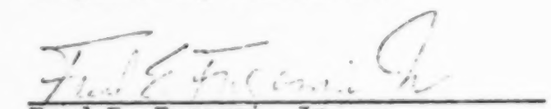
H.
Parties

The parties in the Court below consisted of each of the petitioners and the United States of America. Tommy Wayne Simpson was represented by the Federal Public Defender's Office in each bank robbery. Due to a potential conflict Michael Lee Simpson was represented in one of the bank robberies by the Honorable Robert W. Willmott, Jr., and was represented in the remaining bank robbery by the Federal Public Defender's Office.

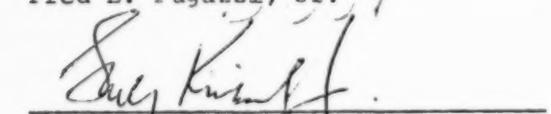
I.
Opinions

The opinions of the Sixth Circuit Court of Appeals, the Fourth Circuit and the Eighth Circuit are attached hereto.

Respectfully submitted,



Fred E. Fugazzi, Jr.



Shelby C. Kinkead, Jr.
P. O. Box 1489
111 Church Street
Lexington, Kentucky 40501
606-252-2312 ext. 2701
Federal Public Defender's Office

Nos. 76-1459, -1460, -1465, -1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 14 1976

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs Nos. 76-1459 & -1466 :
MICHAEL LEE SIMPSON, :
Defendant-Appellant :

ORDER

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs Nos. 76-1460 & -1465 :
TOMMY WAYNE SIMPSON, :
Defendant--Appellant :

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration of the record, the briefs and oral arguments of counsel we are of the opinion that the defendants were properly charged with the armed robbery of two banks, on different occasions, and were convicted by juries in two trials, and they received consecutive sentences for violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c).

The two statutes, in our opinion, relate to separate offenses involving different elements, and they are not duplicitous. United States v. Crew, ___ F.2d ___ (4th Cir. No.75-1581, 1976). Perkins v. United States, 526 F.2d 688 (5th Cir. 1976). The District Court was not required to impose concurrent sentences

for the two separate bank robberies nor under the two statutes.

Finding no prejudicial error either in the convictions or in the sentences, it is ORDERED that the judgments of conviction be and they are hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Nos. 76-1459, -1460, -1465, -1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	
vs Nos. 76-1459 & -1466	:	
MICHAEL LEE SIMPSON,	:	
Defendant-Appellant	:	ORDER
UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	
vs Nos. 76-1460 & -1465	:	
TOMMY WAYNE SIMPSON,	:	
Defendant-Appellant	:	

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration it is ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

File

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1580

United States of America, Appellee.

versus

Zacherie Leroy Crew, Appellant.

No. 75-1581

United States of America, Appellee.

versus

Dewayne Jones, Appellant.

No. 75-1582

United States of America, Appellee.

versus

Leonard Carter, Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued February 5, 1976 Decided APR 8 1976

Before CRAVEN and WIDENER, Circuit Judges, and JONES, Chief District Judge.*

Robert L. Dolbeare [court-appointed counsel] (Obenshain, Hinnant, Dolbeare & Beale on brief) for Appellant in 75-1580; F. Bryon Parker, Jr., [court-appointed counsel] for Appellant in 75-1581; J. Thomas McGrath [court-appointed counsel] (Nance, Simmons, Guill, McGrath & Catlett on brief) for Appellant in 75-1582; Rodney Sager, Assistant United States Attorney, (William B. Cummings, United States Attorney, on brief) for Appellees in 75-1580, 75-1581 and 75-1582.

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* Sitting by designation.

JONES, Chief District Judge:

In the bill of indictment, Zacherie Leroy Crew, Dewayne Jones, and Leonard Carter were charged in Count I with the robbery of the Meadowood Branch of the Central National Bank in Henrico County, Virginia, on September 26, 1974 in violation of 18 U.S.C. 2113(a) and (d), in Count II with willfully and unlawfully carrying a firearm during the commission of the robbery in violation of 18 U.S.C. 924(c)(2), and in Count III with willfully using a firearm in the commission of the robbery in violation of 18 U.S.C. 924(c)(1). All three defendants were charged as principals, and as accessories under 18 U.S.C. 2, and were tried together. The jury returned a verdict of guilty against all defendants on each Count and the trial court imposed identical sentences on Crew and Jones of thirteen years on Count I, one year on Count II, and one year on Count III. Carter received fifteen years on Count I and one year each on Counts II and III. All sentences were pronounced under the provisions of 18 U.S.C. 4208(a)(2) and were to run consecutively.

Although numerous questions are raised in this appeal, we find only those relating to sentencing meritorious. Therefore, it is our conclusion that no substantive defect in trial

is to be found in any of these cases, and the convictions should be affirmed. We now proceed to the consideration of whether there is any infirmity in the sentences imposed.

First, appellants Jones and Carter contend that Counts II and III, charging the unlawful carrying and use of a gun in the commission of a felony under Section 924(c), should be dismissed upon the ground that these offenses merged into the armed bank robbery offense contained in Section 2113(d). They concede that Section 924(c) sets forth a separate crime when the related offense makes no statutory provision for the use of a firearm. United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972); United States v. Vigil, 458 F.2d 385 (10th Cir. 1972); United States v. Ramirez, 482 F.2d 807 (2nd Cir. 1973). However, it is their contention that the armed robbery provisions of Section 2113(d) preclude conviction and sentencing under both Sections 2113(d) and 924(c). They argue that to hold otherwise would violate their constitutional right under the Fifth Amendment to be free from dual punishment for a single offense.

After a careful examination of the statutes and cited authority, we find that Section 924(c) does establish a separate offense from that of armed bank robbery, and hold that a separate sentence under each section was proper.

It is well established that a defendant may be convicted of two separate offenses arising from a single act so long as each requires proof of a fact not essential to the other. Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); Montgomery v. United States, 146 F.2d 142 (4th Cir. 1944). Expressed another way, it must be shown that the two offenses charged are in law and in fact the same offense before a double jeopardy claim is viable. Hattaway v. United States, 399 F.2d 431 (5th Cir. 1968); Dryden v. United States, 403 F.2d 1008 (5th Cir. 1968). When Section 2113(d) is compared with Section 924(c), it becomes apparent that different elements of proof are required. United States v. Canty, 469 F.2d 114, 129 (U.S. App. D.C. 1972).

In order to sustain a conviction under Section 2113(d) the government must establish that the perpetrator assaulted a person, or jeopardized the life of a person, by using a dangerous weapon or device during the commission of the robbery. In comparison, in order to sustain a conviction under Section 924(c) the government must establish that the perpetrator used or carried a firearm during the commission of a felony. The appellants would have us equate "using a dangerous weapon or device" with "used or carried a firearm" and find that the

prohibition against double jeopardy has been violated. However, it is clear that Congress never intended to equate these terms.

The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of nonexplosive weapons. On the other hand, Section 2113(d) punishes a felon for the use of any weapon or device during the course of a bank robbery which jeopardizes the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are affirmed. However, the challenge of appellant Crew to the bifurcated sentence under Section 924(c)(1) and (2) presents a more troublesome question.

Appellant Crew contends that it was error for the trial court to impose separate sentences under Counts II and III which respectively charge the unlawful carrying of a firearm in the commission of a felony in violation of Section 924(c)(2), and the unlawful use of a firearm in the commission of a felony in violation of Section 924(c)(1). The appellant argues that Section 924(c) was intended to charge only a single crime, and therefore the trial court's "pyramiding" of sentences was improper. On the facts of this case, we agree.

From a studied examination of the statutory language and the legislative history of the statute, there is nothing to indicate that the Congress intended to make the carrying of a firearm in the commission of a felony a separate crime from the use of a firearm in the commission of a felony when the carrying is shown to be a part and parcel of its use. Rather, it appears that Congress intended to punish for this lesser act, if the culprit should only carry the firearm during the course of the felony and not use it. See Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957); Phillips v. United States, 518 F.2d 108 (4th Cir. 1975); United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975); United States v. Curry, 512 F.2d 1299 (4th Cir. 1975).

In the case at bar the evidence adduced at trial of the gun's use was exclusively relied upon to show the related crime of "carrying". In such a situation, where a single act is the proof of two offenses set forth in the same subsection, it is our opinion that Congress did not intend for separate sentences to lie. Cf. Prince v. United States, supra; Phillips v. United States, supra. See also United States v. Atkinson, supra; United States v. Curry, supra. Therefore, upon the facts of of this case we conclude that the offense of "carrying" the firearm merged into the offense of "using" the firearm, and that separate sentences under Counts II and III were improper. Upon

this basis we remand to the district court for the sole purpose of vacating the sentence under Count II imposed upon each defendant.

Affirmed in part; reversed in part and remanded.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 75-1926

United States of America, Appellee, v. James Theodore Eagle, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the District of South Dakota.

Submitted: May 11, 1976

Filed: July 30, 1976

Before VOGEL, Senior Circuit Judge, and HEANEY and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

James Theodore Eagle, an Indian, appellant here and defendant below, was convicted in the United States District Court for the District of South Dakota of an assault with a dangerous weapon upon the person of James Catches, another Indian, with the assault taking place on the Pine Ridge Indian Reservation, in violation of 18 U.S.C. § 1153, as amended, and of having used a firearm in the commission of the offense in violation of 18 U.S.C. § 924(c)(1). The district court sentenced the defendant to imprisonment for three years on each of the two counts of the indictment with the sentences to be served consecutively. The defendant appeals.

We affirm the conviction and sentence on Count I, the

§ 1153 count. As to Count II, the § 924(c)(1) count, we reverse and remand the case with directions that Count II be dismissed.

I.

The government's evidence at trial showed that, on the afternoon of May 17, 1975, James Catches was riding from Oglala, South Dakota to Pine Ridge, South Dakota in a car driven by Dale Janis. There were three other men in the car: Lloyd Bissonette, Maurice Waters and Ezzard Tobacco. All had been drinking to some degree on that day. The men had traveled about a mile from Oglala when they stopped, near a historical marker, to add oil to their car's engine. The spot where they stopped was on the Reservation.

All the men were in the car, and they were about to leave the marker when a green car came weaving down the road toward them. This car stopped in the middle of the highway. Two men with rifles emerged. One of these men was identified by three of the occupants of the first car - Janis, Walters and Bissonette - as the defendant, James Eagle. Janis attempted to drive his car around the green car. As he was doing so, he heard three shots. One of the shots struck the arm of James Catches above the wrist, causing a severe wound.

The defendant presented an alibi defense. Nonetheless, the jury found him guilty on both counts. As stated, consecutive three year sentences were imposed.

Appellant subsequently moved for a new trial on the basis of newly discovered evidence. Among the grounds presented was an allegation that one of the jurors, Keith Long, had admitted that he realized during the trial that Eagle was one of the men charged with the shooting of two FBI agents at

Oglala, in an unrelated incident. Appellant's counsel filed an affidavit, in which he asserted that he learned this from Charles Dorothy, another attorney, who claimed to have spoken to juror Long.

A hearing was held on the new trial motion. Appellant moved to subpoena the jurors, but the motion was denied. Charles Dorothy did testify; he stated that Long told him that he did realize during the trial that Eagle was connected with the FBI shootings. Dorothy said that Long did not communicate this belief to the judge or to any court official.

The government submitted the affidavit of juror Long. Long admitted that during the trial he had speculated that Eagle might be one of the men charged in the FBI deaths.[1] However, he asserted that this specualtion was not discussed with any other juror, and did not affect his own decision in the case.

On this evidence, the district court denied the motion for new trial. A timely appeal was taken from both the conviction and the denial of the new trial motion.

Appellant presents these arguments for reversal: that the trial court erred in denying his motion to subpoena the jurors; that the court did not have jurisdiction of the § 924(c)(1) charge; that the evidence was not sufficient to support the verdict; and that the imposition of consecutive sentences was improper.

II.

A defendant who seeks to overturn a verdict by proof of

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[1] On voir dire, the jurors had been asked if they had ever heard of appellant. Long replied in the negative.

jury misconduct must overcome two obstacles. First, he must produce evidence which is not barred by the rule of juror incompetency. Secondly, his evidence must be sufficient to prove "grounds recognized as adequate to overturn the verdict." See Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 1119 (1976).

Appellant here has not shown an ability to pass the first obstacle. The evidence which he proposes to produce by summoning the jurors to testify would not be competent to impeach the verdict. Accordingly, we conclude that the district court acted correctly in denying the motion to subpoena the jurors, and in denying the new trial motion.

Rule 606 (b) of the Federal Rules of Evidence is a codification of the common law rule relating to juror testimony.

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . . .

See generally Government of Virgin Islands v. Gereau, supra, 523 F.2d at 149; Downey v. Peyton, 451 F.2d 236, 239 (4th Cir. 1971); United States ex rel. Owen v. McMann, 435 F.2d 813, 819 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971). The general rule both at common law and under the Rules of

Evidence is one of incompetency, with an exception made for testimony relating to extraneous information or improper influence in the jury room.

Appellant contends that Long, if subpoenaed, would testify that he realized during the trial that Eagle was connected with the FBI shootings. He contends that this realization constituted an "extraneous influence," and that Long's testimony is therefore competent under the exception to the general rule. He argues that he should be allowed to subpoena not only Long but also the remaining jurors to determine whether they entertained similar speculations.

Appellant's argument ignores a crucial fact: no contention has been made that juror Long voiced his suspicions about appellant's identity in the jury room. In fact, by affidavit Long denies mentioning his speculation. This is fatal to appellant's position.

A central purpose of the rule of juror incompetency is the prevention of fraud by individual jurors who could remain silent during deliberations and later assert that they were influenced by improper considerations. See Mattox v. United States, 146 U.S. 140, 148 (1892). If there were no rule of incompetency, the "secret thought of one" juror would have "the power to disturb the expressed conclusions of twelve." Id., 146 U.S. at 148. For this reason, courts have insisted in cases of this sort that proof be limited to "overt acts which are susceptible to the knowledge of other jurors." Gafford v. Warden, 434 F.2d 318, 320 (10th Cir. 1970); see United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975).

Appellant's allegations do not go beyond the mental process of juror Long. Appellant has alleged no overt acts suscepti-

ble to the other jurors' knowledge. He has thus not shown that competent evidence could be produced by summoning Long to testify, and so may not subpoena him.

Similarly, appellant has no right to subpoena the remaining jurors. He has made no specific allegations that any of them engaged in overt improper acts susceptible of proof. He clearly has no general right to subpoena the jurors in the absence of such allegations. United States v. Dye, 508 F.2d 1226, 1232 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975); Smith v. Cupp, 457 F.2d 1098, 1100 (9th Cir.), cert. denied, 409 U.S. 880 (1972); Dickinson v. United States, 421 F.2d 630 (5th Cir. 1970).

It is clear that, in the absence of specific allegations of ability to adduce competent evidence, the district court properly denied both the motion to subpoena jurors and the motion for a new trial.

III.

Count II of the indictment is based on 18 U.S.C. § 924(c), which provides: "Whoever (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States. . .shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years." This statute creates an offense separate from the underlying felony. United States v. Howard, 504 F.2d 1281, 1286 (8th Cir. 1974); United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972). Its purpose is to prevent the carrying and use of firearms in the commission of federal felonies. See United States v. Howard, supra, 504 F.2d at 1286.

Appellant contends that although the statutory language

is broad ("any felony"), Congress did not in fact intend that a prosecution for violating § 924(c)(1) would be available where the underlying felony is that charged here, an assault with a dangerous weapon in violation of 18 U.S.C. § 1153, the Major Crimes Act. We agree, and so vacate the Count II conviction.

A.

We reach this result first because § 1153 itself provides an increased penalty for use of a dangerous weapon. We are convinced that Congress did not intend § 924(c)(1) to be applicable in a case involving such a statute.[2]

We are led to this conclusion by the legislative history of § 924(c)(1). This section originated as a House floor amendment to a bill to amend the Gun Control Act of 1968;[3] the only legislative history consists of the floor debates prior to the bill's passage. The debates evidence a congressional concern with the rising incidence of the use of firearms in the commission of crimes, and an intention to deter such use by imposing higher penalties on federal criminals who use firearms.[4] See United States v. Melville, 309 F.Supp. 774 (S.D. N.Y. 1970).

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[2]Our conclusion is based solely on statutory grounds. We need not reach the question whether Congress could, consistent with the double jeopardy clause, punish as separate crimes (1) an assault with a dangerous weapon and (2) the use of a firearm in committing the assault.

[3]H.R. 17735, 90th Cong., 2d Sess. (1968), enacted as Pub. L. 90-618, Title I, § 102, 82 Stat. 1223.

[4]See 114 Cong. Rec. 21765 passim (1968).

The amendment's sponsor, Representative Poff, apparently recognized that certain federal crimes already entailed increased penalties if committed with firearms. He expressed his intention that the new statute would not be applicable to these crimes. He said:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officials, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other firearm felonies.

114 Cong. Rec. 22232 (1968) (remarks by Representative Poff).[5]

The sections of Title 18 enumerated by Representative Poff (except Chapter 44) have this in common: all impose a higher penalty for the felony specified if it is committed with a "dangerous" or "deadly" weapon. Representative Poff's remarks evidence a clear congressional intention that the new statute not be applicable in cases involving statutes of this type. This intention accords with the deterrence rationale of § 924(c)(1). It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so.

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[5]It is proper to consult this legislative history to determine whether Congress meant the phrase "any felony" to have a literal meaning, even though the statute is arguably unambiguous. "[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train v. Colorado Public Interest Research Group, 44 U.S.L.W. 4717, 4719 (U.S. June 1, 1976); United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) (footnotes omitted).

The crime charged in Count I, an assault between Indians in Indian country, is clearly a crime of the same type as those enumerated by Representative Poff. If committed with a dangerous weapon, it is a federal offense. If committed without a dangerous weapon, it is a minor offense within tribal jurisdiction. See 18 U.S.C. § 1152. The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of § 924(c)(1) to the crime is not necessary, and apparently was not intended by Congress.[6]

We thus conclude that a crime of the type charged in Count I, i.e., one for which the penalty is enhanced by use of a dangerous weapon, cannot form the basis of a prosecution under § 924(c)(1).

B.

We are convinced that § 924(c)(1) is inapplicable here

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[6]For a contrary result, it could be argued that Representative Poff did not specifically mention the § 1153 assault with a deadly weapon in his floor remarks, and that he therefore did not intend to exclude it from the operation of § 924(c)(1). However, we can perceive no apparent rational purpose for singling out the § 1153 offense, among dangerous weapon offenses, to be the basis of a § 924(c)(1) charge. Moreover, to do so would create serious constitutional problems. Representative Poff explicitly excluded from the increased penalty 18 U.S.C. § 113, which would be applicable to the assault charged here if it had been committed by a non-Indian on an Indian. Singling out the Indian defendant for harsher treatment may well run afoul of the equal protection aspects of the fifth amendment due process clause. See United States v. Cleveland, 503 F.2d 1067, 1070 (9th Cir. 1974); United States v. Goings, 527 F.2d 183 (8th Cir. 1975); United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975). The desirability of avoiding the equal protection questions which would be created is a factor leading us to the construction adopted in the text. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

for a second reason: federal jurisdiction of Count I arises by reason of the Major Crimes Act, 18 U.S.C. § 1153. It is our conclusion that Congress did not intend for a § 924(c)(1) prosecution to be available where the underlying felony is based on § 1153.

This conclusion is reached, again, after an examination of the legislative history and the purposes behind the two statutes.

We have already referred to the history of § 924(c)(1). As indicated, it is a relatively new statute, passed after only floor debate. Its purpose is to deal in a broad stroke with a specific evil - the use of firearms by federal felons.

Section 1153, in contrast, is a very old statute.[7] Together with 18 U.S.C. § 1152, it represents an attempt to balance the sometimes conflicting interests of the federal government, the Indian tribes, and the states in the regulation of criminal conduct in Indian country. See generally Keeble v. United States, 412 U.S. 205, 209-12 (1973). By the terms of § 1152, the general laws of the United States relating to government territory were extended to Indian country, except in certain cases, including those involving offenses between Indians. By terms of § 1153, certain major crimes between Indians were brought within federal jurisdiction. Among these crimes is the assault with a dangerous weapon which is the subject of Count I of the instant indictment.

From time to time these statutes have been amended to

[7]Certain provisions of the current statute date from 1885. Act of March 3, 1885, c. 341, § 9, 23 Stat. 362, 385.

adjust the balance among the competing sovereignties. Particularly, § 1153 has been amended to provide that certain crimes, including the assault with a deadly weapon charged here, be "defined and punished in accordance with the laws of the State in which such offense was committed."[8] These amendments represent an evident congressional purpose to conform the punishment of these crimes to that provided by state law.

To allow a § 924(c)(1) prosecution to be based on a § 1153 violation would conflict with this purpose. It would in effect impose a new federal penalty for conduct which Congress has determined will be punished in accordance with state law.[9]

We are thus faced with a conflict between two statutes: a general criminal statute, and a statute dealing with the specific problem of criminal conduct in Indian country. The rules of construction are clear as to which must prevail.

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

[8]Act of Nov. 2, 1966, Pub. L. 89-707, § 1, 80 Stat. 1100.

[9]We are aware that because § 924(c)(1) creates a new offense, the penalty for its violation is technically not a penalty imposed for the § 1153 crime. It can be argued that the two statutes are therefore not in conflict and that § 1153 itself is still punished solely in accord with state law. In ascertaining congressional intent, however, we look to the substance, rather than the form, of the statutes. Application of § 924(c)(1) here would clearly thwart the objective of amended § 1153: leaving the fixing of punishment for this conduct to the states.

2A Sutherland, STATUTORY CONSTRUCTION, ¶ 51.05 (4th ed. 1975).

There is no indication that Congress, in enacting § 924 (c)(1), intended to disturb the statutory scheme relating to Indian offenses. Therefore, § 1153, the specific statute dealing with the punishment of such offenses, must prevail as the controlling statement of national policy in this area. That section provides that the crime charged here must be punished in accordance with state law. The inapplicability of § 924(c)(1), which creates a federal penalty, is clear.[10]

For these reasons, as well as for the reasons stated in IIIA above, we conclude that, under the proper construction of § 924(c)(1), "any felony" does not include the crime charged in Count I of this indictment: assault with a dangerous weapon in violation of § 1153. This being so, Count II of the indictment fails to charge an offense against the United States, and the conviction entered on that count must be vacated.

IV.

Appellant contends that the evidence was insufficient to prove beyond reasonable doubt that he was the man who shot and wounded Catches. Of course, in determining the sufficiency of the evidence we view the evidence in the light most favorable to the government, giving the government the benefit of all reasonable inferences favorable to its case which may be

[10]The authorities relied upon by the government for the proposition that the general criminal laws of the United States apply in Indian country (see, e.g., Stone v. United States, 506 F.2d 561 (8th Cir. 1974); Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967) are inapposite. Those cases did not present the problem, present here, of conflict between a general criminal statute and the statutory scheme governing Indian country offenses.

drawn therefrom. See United States v. Wisdom, ___ F.2d ___ (8th Cir. No. 75-1756, April 28, 1976); United States v. Diggs, 527 F.2d 509, 512 (8th Cir. 1975).

Here, three government witnesses placed appellant at the scene of the crime, with a gun in his hand, immediately before the firing of the shots. Appellant, by alibi testimony, attempted to place himself elsewhere. The jury chose to believe the government's witnesses; this court cannot say that it erred in so doing.[11] The sufficiency of the evidence to support the guilty verdict is apparent.

V.

Appellant finally contends that the trial court improperly imposed consecutive three year sentences on the two counts. He argues that, because appellant was young and had no prior convictions, the district court erred in imposing such harsh sentences.

Our disposition of Count II moots any claim based on the second three year sentence. The remaining sentence was within the statutory limits for this serious offense. A proper "no benefit" finding under the Federal Youth Corrections Act was made. Appellant's attack on the sentence is therefore without basis. Dorszynski v. United States, 418 U.S. 424, 431 (1974); United States v. Crow Dog, ___ F.2d ___ (8th Cir. No. 75-1934, June 17, 1976).

For the reasons stated above, the conviction on Count II cannot stand. However, no basis for reversal on Count I has been shown.

[11]That the government's witnesses admitting to drinking on the day of the offense is not conclusive, but is merely a factor going to the credibility of their testimony.

The conviction and sentence on Count I are affirmed; the conviction and sentence on Count II are reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.